

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

77-4049

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GENERAL DYNAMICS CORPORATION,
ELECTRIC BOAT DIVISION

Petitioner

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

and

SAMMIE L. GRAY

and

INSURANCE COMPANY OF NORTH AMERICA

Respondents

ON PETITION FOR REVIEW OF A DECISION
AND ORDER OF THE BENEFITS REVIEW BOARD

BRIEF FOR THE DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Is the decision of the Benefits Review Board, affirming the administrative law judge's holding that General Dynamics is liable as a self-insured employer for the payment of workers' compensation benefits to Gray, despite the fact that symptoms of Gray's then undiagnosed but not totally disabling asbestosis manifested themselves prior to General Dynamics's becoming a self-insured, but during the time General Dynamics was insured by Insurance Company of North America, in accordance with law?

COUNTER-STATEMENT OF THE CASE

This case arose upon the filing of a claim for benefits by Sammie L. Gray, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. 901 et seq. (Supp. V, 1975) (hereinafter referred to as the Act). Gray was employed by General Dynamics Corporation, Electric Boat Division, from 1962-1969, and from 1970-1973, as a pipe lagger, installing asbestos insulation in vessels being built by General Dynamics. Gray first began to have respiratory difficulties in June, 1972, which caused him to miss several days work at that time. Later, in March, 1973, Gray missed six weeks of work due to general pulmonary, nose and throat difficulties. Finally, on September 27, 1973, Gray was forced to leave General Dynamics because of the severity of his pulmonary complaints. Although his previous difficulties had led him to visit a number of doctors, including one at the behest of General Dynamics, Gray was not informed until after he underwent a biopsy during hospitalization in October, 1973, that his pulmonary and respiratory problems were a result of asbestosis. Asbestosis occurs as a result of the inhalation of asbestos fibers, a hazard to which Gray was exposed only during his employment with General Dynamics.

Following his recovery from the above-mentioned surgery, Gray was unable to resume his former occupation with General Dynamics; nor was he able to secure other employment, due to

his pulmonary and respiratory problems. Gray therefore filed a claim for compensation for total disability pursuant to the Act. A hearing was held on September 11, 1975, pursuant to § 19 of the Act, as amended, 33 U.S.C. 919 (Supp. V, 1975), at which the parties were represented by counsel, and were afforded the opportunity to introduce evidence, to examine and cross-examine witnesses, and to make oral and written legal arguments. Although other issues were litigated which are not germane to the instant appeal, General Dynamics contended that if Gray were awarded compensation for any degree of disability caused by his employment related asbestosis, then Insurance Company of North America should be found liable to pay the claim.

INA was General Dynamic's workers' compensation insurance carrier under the Act during Gray's employment there until April 1, 1973. Thereafter, until Gray left General Dynamics on September 27, 1973, General Dynamics was a self-insurer. General Dynamics took the position that even though it was self-insured during Gray's last period of employment with them prior to his discovery of the work-relatedness of his disease in October, 1973, Gray's pulmonary and respiratory problems which had occurred prior to April 1, 1973 (while INA was still General Dynamic's carrier) were also attributable - in the light of hindsight - to the then undiagnosed asbestosis. Thus, argued General Dynamics, INA was the insurer when the asbestosis first manifested itself and should, therefore, be liable for the claim.

The administrative law judge awarded Gray compensation for total disability, and held General Dynamics liable to pay the award, citing this Court's decision in Travelers Insurance Co. v. Cardillo, 225 F.2d 137 (1955). The administrative law judge declined to make any findings regarding whether INA might, as General Dynamic's former insurer, be liable to reimburse General Dynamics for its payments to Gray, stating that the appropriate forum for such an adjudication was a court and not the administrative adjudicative procedures created under the Act.^{1/} (App. 13a-14a).

^{1/} At p. 10 of its brief, General Dynamics states that the administrative law judge held General Dynamics liable for Gray's compensation only as an employer, and refused to rule whether General Dynamics, as a self-insured, or INA, as its carrier, was liable. We submit that the administrative law judge held General Dynamics liable both as an employer and as the last (self) insurer during Gray's exposure to asbestos dust and prior to his discovery of the work-relatedness of his pulmonary and respiratory problems. Such is the result demanded by Travelers Insurance Co. v. Cardillo, supra, which was cited by the administrative law judge (App. 14a). The Board also found this to be the administrative law judge's holding (App. 2a-3a). The administrative law judge merely refused to decide whether INA might be liable to General Dynamics under any theory other than as a matter of workers' compensation law (e.g., some contractual theory). Indeed, the record was void of any evidence necessary to make such a determination, other than that which can be made as a matter of workers' compensation law under Travelers, supra. In any event, even if it were found that the administrative law judge did not hold General Dynamics liable as a self-insured, and that he refused to rule on the question, the Board's statement that the administrative law judge did so hold is no more than a holding that, as a matter of law (based on the undisputed facts), General Dynamics is liable both as employer and self-insurer; such a result is mandated by Travelers, supra. See discussion infra.

General Dynamics petitioned the Benefits Review Board for review of the administrative law judge's decision, Act, § 21(b), as amended, 33 U.S.C. 921(b) (Supp. V, 1975), seeking an adjudication from the Board that Insurance Company of North America, and not General Dynamics (as a self-insured) was the carrier liable for the payment of Gray's compensation.^{2/} The Board, however, also relying on Travelers, supra, held that General Dynamics, as a self-insured employer, is liable for the payment of Gray's compensation. The instant appeal followed. Act, § 21(c), as amended, 33 U.S.C. 921(c) (Supp. V, 1975).

ARGUMENT

THE DECISION OF THE BENEFITS REVIEW BOARD, AFFIRMING THE ADMINISTRATIVE LAW JUDGE'S HOLDING THAT GENERAL DYNAMICS IS LIABLE AS A SELF-INSURED EMPLOYER FOR PAYMENT OF GRAY'S WORKERS' COMPENSATION AWARD, IS IN ACCORDANCE WITH LAW.

- A. The instant case is directly controlled by this Court's holding in Travelers Insurance Co. v. Cardillo, supra.

The Director submits that under the test set forth by this Court in Travelers Insurance Co. v. Cardillo, supra, General Dynamics, as the "last carrier" (i.e., self-insured) of the last (indeed, only) employer with which Gray was exposed to the

^{2/} Again, other issues were raised before the Board which are not raised herein, and are not relevant to this appeal.

injurious asbestos dust, was properly held liable for the payment of compensation.

In Travelers, this Court analyzed problems virtually identical to the issue herein. There the occupational disease was hearing loss. The Court held that the last employer with which a claimant suffers injurious exposure to a deleterious stimulus is liable for all of the cumulative effects of such exposure, even when much or even virtually all of the exposure occurred with other employers, and when the exposure with the last employer would not, in all probability, itself have been sufficient to cause the resulting disability. 225 F.2d 145.

This conclusion was based upon two considerations. First, the Court noted the virtual impossibility of apportioning the liability for disability resulting from an occupational disease of long-term etiology. 225 F.2d 144. Secondly, the Court noted that the legislative history indicated that a proposal for ratable apportionment between or among all employers, who had to varying degrees and for various lengths of time exposed a claimant to an injurious stimulus, had been suggested to Congress in hearings held pursuant to the enactment of the Act, but had not been adopted. 225 F.2d 145. Thus, the Court inferred that Congress had rejected the method of apportionment between employers and, instead, intended that the last employer bear the entire liability for compensation. Realizing that it would be

sheer folly to seek or expect to discover
a formula devoid of any possibility of
inequity or seeming injustice

this Court accepted this rule as a rational method of solving a complex problem which would avoid the delays and difficulties in what it, as noted heretofore, considered to be the virtually impossible task of apportioning liability in occupational disease cases.

225 F.2d 144-145.

The Court then addressed the question of whether, once the liability of the last employer had been determined, successive insurers of that employer during the period of a claimant's last exposed employment should have liability for the claim apportioned between or among them. Adopting its reasoning for formulating the "last employer" rule, the Court likewise concluded that the "last carrier" on the risk would also be liable for the entire amount of compensation.

Specifically, this Court held that

the carrier who last insured the 'liable' employer during claimant's tenure of employment, prior to the date claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be held responsible for the discharge of the duties and obligations of the 'liable' employer.

225 F.2d 145.

It is evident that, on its face, this Court's holding in Travelers controls the outcome in the instant case. Gray's last exposure to asbestos dust, prior to his discovery that he was suffering from an occupationally related disease, occurred between

April and September, 1973, during the period when General Dynamics was (as it continues to be) a self-insurer.^{3/} Indeed, a situation very similar to the instant case was decided in Travelers. See discussion of Johansen award, 225 F.2d 140-141. There, Johansen had suffered his last exposed employment with Ira S. Bushey & Son from 1942 to 1955. During that period Bushey had been insured for worker's compensation liability by; American (June 8, 1927 - May 31, 1953); Hartford (June 1, 1953 - September 8, 1953); and State (September 9, 1953 - September 16, 1953 and continuing). Johansen had first noticed a hearing impairment in January and February, 1953; this persisted without diminution for several months, and Johansen consulted an ear specialist who informed him on September 16, 1953, that the impairment was work related. Johansen filed a claim for worker's compensation on October 5, 1953. He was awarded compensation and the liability for payment was placed jointly, equally and severably on American, Hartford and State, Bushey's (the "last employer")

^{3/} At p. 16 of its brief, General Dynamics argues that: (1) the record contains no evidence that Gray was exposed to the injurious stimuli (i.e., asbestos dust) in his employment between April 1 and September 27, 1973; and (2) that INA, in order to avoid liability, must prove a causal connection between any exposure which may have occurred between April 1 and September 27, 1973, and Gray's current disability. General Dynamics is wrong on both counts. The record is clear that Gray's employment remained the same both before and after April 1, 1973. App. 128-30. Furthermore, there is no need to show a causal relationship between Gray's current disability and Gray's exposure to the injurious stimuli after April 1, 1973. To the contrary, Travelers mandates that General Dynamics, as a self-insurer during that last period of exposure, is liable "even if the length of employment was so slight that, medically, the injury would, in all probability, not be attributable to that 'last employment.'" 225 F.2d 145 (footnote omitted). (See discussion of Johansen award infra.)

insurer during the period of Johansen's employment. This apportionment was overturned by the Court's disposition of the case, as heretofore discussed and State was named the liable insurer even though it had been on the risk for only one week. The point is, however, that even though Johansen's disease (i.e. hearing loss) had manifested itself first during American's tenure as Bushey's insurer, and had, indeed, lasted during the period of coverage provided by all three insurers, only State, the last carrier, was held liable for the payment of compensation. Under General Dynamic's theory, American would have been liable for the payment of compensation, since Johansen's work related hearing loss had first manifested itself while American was on the risk. Extending that theory to the instant case, General Dynamics argues that INA should be held liable for Gray's award since Gray's asbestosis first manifested itself (it is alleged by hindsight) during INA's tenure as General Dynamic's carrier. Such was not the result in the Johansen award as modified by Travelers, however, and since the cases are indistinguishable on this point, such was not - and should not be - the result herein.

- B. General Dynamics has presented no arguments sufficient to cause this Court to overrule or make an exception to its holding in Travelers.

As previously demonstrated, this Court's decision in Travelers mandates an affirmance of the Benefits Review Board's decision in the instant case. Indeed, General Dynamics does not dispute the validity of Travelers case, but, without drawing any significant distinctions between that case and the instant case, asks this Court to carve out an exception to the holding in Travelers. Having shown no material distinctions between the situations addressed in Travelers and the instant case, however, General Dynamics is, in fact, requesting that this Court overrule Travelers and formulate a new rule which would allow the apportionment - to the extent of a one hundred per cent liability against INA in this case - between or among the successive insurers of a last employer.

The Director submits that the rationale underlying this Court's adoption of the "last employer - last carrier" rule is still valid. First, the "exceedingly difficult, if not practically impossible" (225 F.2d 144) task of making determinations regarding the onset of, and the degree of disability attributable at any given time to, most occupational diseases, is as real today as it was twenty-two years ago. Indeed, medical science is just beginning to disclose many previously undetected and even unsuspected occupational diseases of uncertain etiology. See Solomons, Workers' Compensation for Occupational Disease Victims: Federal Standards and Threshold Problems, 41 Alb. L.R. 195, 202-203, 221 (1977).

Even if it were possible to make reasonably certain determinations in the case of some occupational diseases, so that apportionment or shifting of liability could be achieved with some degree of precision, it would not be wise to allow such apportionment or shifting of liability in those cases. Not only would such a rule encourage the litigation of such issues in virtually every case involving successive employers and/or carriers, with the attendant difficulties and delays recognized in Travelers, 225 F.2d 145; but such a rule would also be in derogation of the intended self-executing feature of the Act (see § 14(a), 33 U.S.C. 914(a)) which depends greatly on predictability of result, thus minimizing the need to resort to litigation in order to determine the liabilities and rights of the respective parties.^{4/}

Secondly, General Dynamics has made absolutely no attack on Travelers discussion of the legislative history of the original passage of the Act, which provided the second basis of the "last employer - last carrier" rule. An industry representative sought to amend the original language of the

^{4/} Indeed, this policy to avoid such vexing litigation is so strong that the last employer-carrier rule is well established as a matter of general workers' compensation law. See generally 4 A. Larson, The Law of Workmen's Compensation, §§ 95.11, 95.12, 95.21 (1976).

bill's definition of "injury" as including "disease arising out of employment"^{5/} by providing:

But only such proportion [of the disability caused by a disease] shall be compensated by the employer in whose employment disability begins as the period employed by such employer bears to the total period of the accumulation of such disease.

Hearing before the House Committee on the Judiciary, 69th Cong., 1st Sess., on H.R. 9498, April 8, 15 and 22, 1926, Serial 16 72.

As the witness clearly explained,

Leaving it as it is now, if a disability occurs during his employment, that is enough to put upon the employer at the time the disability occurred the entire expense, * * *

so long as the employment involved exposure, however briefly or slightly, to the conditions which caused the disease. Id. at 74. He further indicated that, for the sake of simplicity, the exposure during only the one year preceding the onset of disability need be considered. Id. at 75. See also id. at 115; Hearing before the House Committee on the Judiciary, 69th Cong., 1st Sess. on S.3170, June 29, 1926, Serial 16, Part 2 155-56, 195-96, 198, 207. The definition, nevertheless, was passed substantially as originally drafted, without any change in its

^{5/} H.R. 9498, 69th Cong., 1st Sess. § 2(b)(2), reprinted in Hearing before the House Comm. on the Judiciary, 69th Cong., 1st Sess., on H.R. 9498, April 8, 15 and 22, 1926, Serial 16 1-2.

comprehensive inclusiveness of occupational diseases and without any provision for apportionment of liability.

As discussed hereinbefore, this Court in Travelers relied upon that legislative history to infer that

Congress intended that the employer during the last employment * * * should be liable for the full amount of the award.

* * * * *

* * * [T]reatment of carrier liability was intended to be handled in the same manner as employer liability * * *.

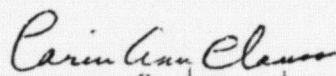
225 F.2d 145 (emphasis supplied).

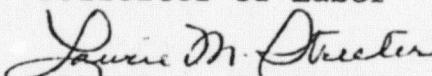
We submit that Congress has taken no action which would indicate an intent to withdraw from or change the rule as recognized in Travelers. To the contrary, under the black lung benefits provisions of the Federal Coal Mine Health and Safety Act, 83 Stat. 742, as amended, 30 U.S.C. 901 et seq. (Supp. V, 1975), pursuant to regulatory authority granted the Secretary of Labor, it is the "last employer" who is liable for the payment of compensation. See 20 CFR 725.311^{6/} The regulation has been upheld as "consonant with due process" in National Independent Coal Operations Association v. Brennan, 316 F. Supp. 16 (D.D.C.) summarily aff'd, 419 U.S. 955 (1974).

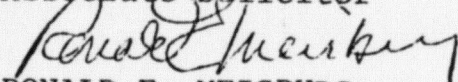
^{6/} Under the Secretary's regulation the "last employer" rule is modified only by a requirement of one cumulative year of coal mine employment with the "last employer" within fifteen years of the date of a claimant's last day of coal mine employment.

CONCLUSION

The Director submits that on its face this Court's decision in Travelers directly controls the outcome in this case. Furthermore, the rationale utilized by this Court in Travelers is still valid; General Dynamics has in no way undermined that decision or distinguished the instant case from it. Rather, the Travelers decision still provides a rational and just rule of easy predictability which is necessary for the efficient operation of the Act. The decision of the Benefits Review Board, adopting the rule in Travelers and relying upon it, should be affirmed.

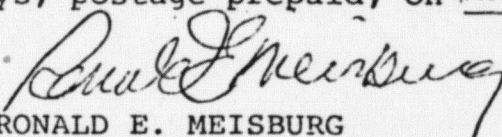

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Director, Office of Workers' Compensation Programs was served on Matthew Shafner, Esq., O'Brien, Shafner, Garvey, Bartinite & Stuart, 500 Bridge Street Extension, Groton, Connecticut 96340, attorneys for Sammie L. Gray; Norman Beans, Esq., Murphy & Beane, 106 State Street, Boston, Massachusetts 92109, of counsel, and Alexander Vitale, Esq., Kirlin, Campbell & Keating, 120 Broadway, New York, New York 10005, attorneys for General Dynamics, Electric Boat Division; and Frank W. Daley, Esq., 109 Church Street, New Haven, Connecticut 96510, attorney for Insurance Company of North America, by mailing copies thereof to said attorneys, postage prepaid, on AUG 12th 1977.


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